

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LIEBB,

No. C 04-4213 CW (PR)

Petitioner,

ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS

v.

J. BROWN, Warden, et al.,

Respondents.

Petitioner Stephen Liebb, proceeding pro se, filed the present petition for a writ of habeas corpus pursuant to title 28 U.S.C. § 2254, challenging as a violation of his constitutional rights a denial of parole by the California Board of Parole Hearings (Board).<sup>1</sup>

Respondents have filed an answer. Petitioner has filed a traverse. Respondent has also filed a supplemental answer, and Petitioner has filed a supplemental traverse. Having considered all of the papers filed by the parties, the Court DENIES the petition.

BACKGROUND

A Los Angeles County jury found Petitioner guilty of first degree murder with the use of a deadly weapon (a knife) in violation of California Penal Code §§ 187 and 12022(b) (Count 1). (Resp't Ex. A, Abstract of Judgment.) The jury also found Petitioner guilty of assault with a deadly weapon in violation of California Penal Code § 245 (Count 2). (Id.) The Los Angeles

<sup>1</sup> The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 County Superior Court sentenced Petitioner to twenty-five years to  
2 life in prison for murder, plus a one year enhancement for the use  
3 of a knife, and a concurrent sentence of three years in prison for  
4 assault. (Resp't Ex. G at 1.) Petitioner was received by the  
5 California Department of Corrections and Rehabilitation on February  
6 15, 1983, and his minimum eligible parole date was January 14,  
7 1997. (Id.)

8 On July 17, 2003, twenty years into his sentence, Petitioner  
9 was found unsuitable for parole for the third time.<sup>2</sup> (Pet. Attach.  
10 at 37.) On September 17, 2003, Petitioner administratively  
11 appealed the Board's 2003 parole suitability decision. (Resp't Ex.  
12 F at 1.) On October 15, 2003, Petitioner's appeal was denied.  
13 (Id.)

14 At Petitioner's 2003 parole suitability hearing, the Board  
15 considered the following information about the murder and assault,  
16 taken from the Los Angeles County Probation Officer's Report, which  
17 in turn was derived from the District Attorney's files, police  
18 report, and transcripts:

19 Diller, who is the victim, and Liebb had been friends for  
20 several years. However, there had been a disagreement  
21 between Liebb and Diller's family over rent payments.  
22 Ill feelings regarding this disagreement continued over a  
23 period of several months that included threats and  
24 physical altercations on two separate occasions. On the  
25 date of the homicide, Liebb drove his motorcycle to the  
victim's girlfriend's house. There he found the victim  
and his girlfriend sitting in the victim's car. Liebb  
jumped in the victim's car from the passenger side,  
climbed across the girlfriend and began striking the  
victim. In an attempt to evade the attack, the victim  
started to drive, but Liebb grabbed the steering wheel

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26 <sup>2</sup> The Board found Petitioner unsuitable for parole in 1996  
27 and 2000. (Answer at 2.)

1 causing the car to veer to the right and crash. The  
2 victim then got out of the car and ran into the park. Liebbs, in foot pursuit, chased him into the park. The  
3 victim . . . dove through a window of a recreation  
4 equipment room located on park grounds. Liebbs, still in  
5 pursuit, then leaned through the broken window and  
6 stabbed the victim once in the chest. According to a  
7 witness, Liebbs then returned to his motorcycle and drove  
8 away. The witness then reportedly walked to the park  
9 where she observed the victim lying on the ground covered  
10 in blood. The victim was pronounced dead at the scene.  
11 An autopsy was performed on . . . July 13th of 1981, and  
12 the cause of death recorded as due to a knife wound to  
13 the chest.

14 (Resp't Ex. C, Subsequent Parole Suitability Hearing Transcript at  
15 11-12.)

16 Petitioner's disciplinary history while incarcerated consists  
17 of two rules violation reports (CDC-115) and one disciplinary memo  
18 (CDC-128A). (Id. at 36.) The most recent CDC-115 was issued on  
19 July 7, 1990 for refusing to work. (Id.) The remaining CDC-115  
20 was issued on March 26, 1989 for fighting with another inmate.  
21 (Id.) His CDC-128A was issued on June 22, 1991 for refusing to  
22 work. (Id.)

23 Prior to his incarceration, Petitioner earned a B.A. in  
24 Marketing in 1976 from Syracuse University, and a J.D. in 1980 from  
25 UCLA Law School. (Resp't Ex. D, Probation Officer's Report at 2.)  
26 The Board reviewed Petitioner's personal background, noting that  
27 his parents supported him throughout law school. (Resp't Ex. C at  
28 23.) As a student, he held temporary jobs such as elevator  
operator and lunch deliverer. (Id.)

During his incarceration, Petitioner did not participate in  
vocational programs offered at San Quentin State Prison (SQSP).  
(Id. at 28.) He testified that he believed that he would not  
benefit from participating in vocational programs, stating:

1       There were other panels that specifically told me that  
2       they didn't need any vocation only avocational. And  
3       there is no vocation here. I am almost 50 years old,  
4       and I don't think I'm going to be a good welder. I  
5       feel that the job skills I have and upgrading my  
6       college education language skills [sic] that's going to  
7       enhance my ability to be employed.

8       (Id.)

9       The Board expressed its concern about Petitioner's lack of  
10      participation in "self-help and therapy, anger management or  
11      alternatives to violence" programs. (Id. at 115.) There is little  
12      or no documentation in Petitioner's central file relating to his  
13      participation in self-help groups. (Id. at 28-30.) Since his  
14      incarceration in 1983, Petitioner participated in one-on-one  
15      therapy in 1985 and in the Fathers Program in 2002. (Resp't Ex. E  
16      at 7.) Petitioner testified that he also participated in Insight  
17      Meditation. (Resp't Ex. C at 29.) He claimed that he chose to  
18      read self-help books because the self-help groups at SQSP were not  
19      "tailored to help [him] with the problem that [he has]." (Id. at  
20      33). In response, the Board expressed its disappointment with  
21      Petitioner's explanation for his lack of participation by stating:

22      [Y]eah, you are different than a lot of inmates, but  
23      I've addressed other inmates in here, doctors, I don't  
24      know if I've had another lawyer. But, very, very  
25      professional people who did one act that got them in  
26      prison. So there are peers here in prison. And they have  
27      attended programs and things. For you to say that you  
28      don't want to be in a program that isn't with your peers,  
29      you know, the whole idea of attending these classes is to  
30      interact with other people, to maybe understand the  
31      motivation and the underlying reason as to why they  
32      committed their crimes. I find that your argument for not  
33      attending self-help [is] very weak and I find your  
34      argument in saying that you already have a law degree. I  
35      know that you're doing a lot of legal work here. And, you  
36      know, perhaps you should use your marketing degree when  
37      you get out, but to go along with what the Board has  
38      recommended of you in the past specifically with self-  
39      help. I think you need to be -- pay very close attention.  
40      I think when you get a transcript of this hearing, that

1       you need to read everything and really see what the  
2       concerns are and try to address them. I don't see  
3       anything at all that gives me any comfort that you have  
4       taken enough of the self-help classes to be assured that  
5       you know how to control your anger.

6       (Id. at 117-18.)

7       The Board considered letters from friends and family from Los  
8       Angeles, New York, and Israel pledging to support Petitioner if the  
9       Board granted him parole. (Id. at 41-52.) Petitioner testified he  
10      had three separate contingency plans to accommodate parole. (Id.  
11      at 41.) Petitioner's mother and sister stated that if he were  
12      paroled to New York, they would give him a place to live and  
13      support him financially. (Id. at 41, 43.) Petitioner's friends  
14      Pat MacDannald and Bernie Dizon pledged to support him if he were  
15      paroled to Los Angeles. (Id. at 51.) Finally, Petitioner  
16      expressed his desire to be paroled to Israel, where he was in  
17      contact with people who could provide him with free room and board.  
18      (Id. at 47.)

19      The Los Angeles County District Attorney's Office opposed  
20      granting Petitioner parole. (Id. at 89-98.) The Deputy District  
21      Attorney suggested parole should be denied because Petitioner had  
22      "somewhat of a Jekyll and Hyde personality." (Id. at 90.) He  
23      argued that Petitioner has not addressed the issue of self-help,  
24      stating:

25      in 1985, he started involvement with some self-help, some  
26      therapy, [and] some psychotherapy. He was involved in  
27      programming for a number of years. Yet despite that  
28      limited period of programing, in 1989, he was involved in  
29      violence in prison. Subsequent to that, he's been  
30      involved in supposedly reading books . . . . Anger  
31      control, anger management, outbursts, and conduct are the  
32      significant concern here. They were the concern at the  
33      time he was out in the free community. That's what led  
34      to his ultimately killing Michael Diller. The vocational  
35      skills Mr. [Liebb] says, well, if you've got legal

1 skills, you don't need vocational skills. It's not his  
2 decision. It's the recommendation of the Board. It's  
3 the same recommendation for self-help and therapy he  
4 rejects doing . . . .

5 (Id. at 94-95.) The Deputy District Attorney also addressed the  
6 cruelty of Petitioner's commitment offense by stating:

7 . . . . an autopsy was forwarded to the inmate's Central  
8 File -- that the knife blade after it was plunged into  
9 [the victim], it was twisted. That is pure and simply an  
10 act of torture. That is an act of great aggression and  
11 gratuitous violence. It is a particularly vicious . . . .  
12 I think it shows a particular viciousness and spontaneity  
13 and violence that has to be viewed in light of other  
14 factors . . . .

15 (Id. at 92.)

16 Diller's next-of-kin also appeared at the hearing, and his  
17 brother pleaded with the Board to deny Petitioner parole. (Id. at  
18 105-110.)

19 The Board reviewed a psychological report dated February 9,  
20 1992 by Dr. Marjorie Tavoularis. (Id. at 76.) The Board noted  
21 that Petitioner refused to share information about his family  
22 background in order to assist Dr. Tavoularis in formulating a  
23 prognosis. (Id.) In response, Petitioner claimed that he withheld  
24 this information because he felt Dr. Tavoularis had a religious  
25 bias against him. (Id. at 78.)

26 The Board also reviewed Petitioner's most recent psychological  
27 report dated August 3, 1999 by Dr. L. Carr, which indicated that  
28 his potential for violence within a controlled institutional  
29 setting was "far below average when compared to the San Quentin  
30 population of inmates." (Id. at 40.) However, the Board found  
31 this psychological report to be inaccurate with regard to  
32 Petitioner's self-help because he had not finished the necessary  
33 programing "which is essential to his adjustment . . . ." (Id. at

1 115.)

2 The Board considered the counselor's notes in the current  
3 Board report, which expressed some concern as to whether Petitioner  
4 adequately addressed the anger issues that led to the commitment  
5 offense. (Id. at 115.) Although the Board recognized that the  
6 counselor said Petitioner posed a low degree of threat, it felt  
7 that the lack of documents on Petitioner's self-help and therapy  
8 warranted more observation and evaluation before granting parole.  
9 (Id. at 115-16.)

10 After a brief deliberation, the Board concluded that  
11 Petitioner was "not suitable for parole and would pose an  
12 unreasonable risk of danger to society or a threat to public safety  
13 if released from prison." (Id. at 111.) The Board issued a three-  
14 year denial of parole. (Id. at 118.) In support of its decision,  
15 it cited the "especially cruel manner" in which the commitment  
16 offense was carried out and how it showed "a total disregard for  
17 inflicting pain or human suffering . . . ." (Id. at 111.) It  
18 cited how he threatened "to kill the entire family" of the victim,  
19 "including himself . . ." and how he "assaulted two victims with a  
20 baseball bat, which was count two . . . ." (Id. at 114, 115). The  
21 Board also based its decision on Petitioner's unstable social  
22 history, and "escalating pattern of violence and . . . history of  
23 unstable and tumultuous relationships with others." (Id. at 112.)  
24 The Board cited a report showing that Petitioner "assaulted a  
25 library monitor . . . by putting a knee to the [library monitor's]  
26 groin . . . " while at UCLA Law School. (Id. at 114.)

27 The Board commended Petitioner for his academic accolades  
28 prior to his incarceration and his exceptional work reports while

1 in prison. (Id. at 113.) The Board also recognized that  
2 Petitioner took a educational course in Spanish and worked as a  
3 food services clerk in prison. (Id.) However, the Board found  
4 that the positive aspects of his behavior did not outweigh the  
5 unsuitability factors. (Id.) The Board recommended that  
6 Petitioner "remain disciplinary free, and . . . upgrade  
7 vocationally and educationally. And, if available, participate in  
8 self-help and cooperate with clinicians in the completion of a  
9 clinical evaluation." (Id. at 116.)

10 On December 29, 2003, Petitioner filed a state habeas petition  
11 in the Los Angeles County Superior Court challenging the Board's  
12 decision. (Resp't Ex. G at 1.) On April 27, 2004, the superior  
13 court denied the petition holding that "the record contains 'some  
14 evidence' to support the Board's finding that Petitioner is  
15 unsuitable for parole," based on: the "inexplicable or trivial"  
16 motive behind the commitment offense which showed "a total  
17 disregard for inflicting pain or human suffering;" his history of  
18 unstable or tumultuous relationships; and his failure to upgrade  
19 vocationally as well as sufficiently participate in self-help  
20 programs. (Id. at 2-3.)

21 On May 20, 2004, Petitioner filed a state habeas petition in  
22 the California Court of Appeal. (Resp't Ex. H.) On June 29, 2004,  
23 the petition was denied. (Id.)

24 On July 12, 2004, Petitioner filed a state habeas petition in  
25 the California Supreme Court, which was denied on September 22,  
26 2004. (Id.)

27 On October 5, 2004, Petitioner filed the present petition. On  
28 January 18, 2005, he filed an unopposed motion for an evidentiary



1 hearing and discovery. There, Petitioner argued that his parole  
2 was denied because the Board has a predisposition to categorize all  
3 life-term crimes as "especially cruel, callous or egregious and  
4 hence 'exceptional'" in an effort to deny parole. In an August 24,  
5 2005 Order, the Court denied Petitioner's motion for an evidentiary  
6 hearing, but granted in part his motion for discovery.<sup>3</sup>

7 On July 11, 2006, Petitioner filed a motion for additional  
8 discovery. On February 15, 2007, he also filed a motion to expand  
9 the record. On May 30, 2007, the Court referred Petitioner's  
10 discovery motion to Magistrate Judge James Larson. On September  
11 25, 2007, Petitioner's motions for expansion of the record and for  
12 additional discovery were granted based on Rule 7 and Rule 6(a) of  
13 the Rules Governing § 2254 Cases, respectively. On October 1,  
14 2007, after conducting discovery, Petitioner requested that the  
15 Court take judicial notice of all of the Board decisions he had  
16 gathered. On November 6, 2007, the Court granted Petitioner's  
17 request.

#### 18 LEGAL STANDARD

19 Because this case involves a federal habeas corpus challenge  
20 to a state parole eligibility decision, the applicable standard is  
21 contained in the Antiterrorism and Effective Death Penalty Act of  
22 1996 (AEDPA). McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir.

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23  
24 <sup>3</sup> Petitioner sought discovery of all parole decisions  
25 pertaining to life-term prisoners between the years 2000 and 2003.  
26 (Aug. 24, 2005 Order at 3.) The Court, however, limited discovery  
27 to the "year prior to Petitioner's most recent denial . . . ."  
28 (Id. at 4.) The Court reasoned that "[i]f it could be shown that  
all, or a significant majority of, such prisoners were denied  
parole . . . based on the exceptional nature of their commitment  
offense, then Petitioner might be able to argue that he is entitled  
to further discovery . . . ." (Id.)

1 2002).

2 Under AEDPA, a district court may not grant habeas relief  
3 unless the state court's adjudication of the claim: "(1) resulted  
4 in a decision that was contrary to, or involved an unreasonable  
5 application of, clearly established Federal law, as determined by  
6 the Supreme Court of the United States; or (2) resulted in a  
7 decision that was based on an unreasonable determination of the  
8 facts in light of the evidence presented in the State court  
9 proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S.  
10 362, 412 (2000). A federal court must presume the correctness of  
11 the state court's factual findings. 28 U.S.C. § 2254(e)(1).

12 Respondents concede that Petitioner has exhausted his state  
13 remedies by filing the petition for a writ of habeas corpus in the  
14 California Supreme Court. (Answer at 12.) Where, as here, the  
15 highest state court to reach the merits issued a summary opinion  
16 which does not explain the rationale of its decision, federal  
17 court review under § 2254(d) is of the last state court opinion to  
18 reach the merits. Bains v. Cambra, 204 F.3d 964, 970-71, 973-78  
19 (9th Cir. 2000). In this case, the last state court opinion to  
20 address the merits of Petitioner's claim is the opinion of the Los  
21 Angeles County Superior Court.

## 22 DISCUSSION

### 23 I. Jurisdiction

24 Respondents argue that the Court does not have subject matter  
25 jurisdiction on the grounds that denial of state parole does not  
26 affect a liberty interest protected by the United States  
27 Constitution. (Answer at 16.) However, the Ninth Circuit has  
28 rejected the contention that California prisoners have no liberty

1 interest in parole and thus have no federal due process rights in  
2 connection with parole eligibility. Sass v. California Bd. of  
3 Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006). Therefore, the  
4 Court has subject matter jurisdiction under 28 U.S.C. § 2254 to  
5 decide whether Petitioner's Fourteenth Amendment right to due  
6 process was violated by the Board's determination that he was not  
7 suitable for parole.

8 II. Due Process Claim

9 A. Some Evidence

10 Petitioner asserts that his due process rights were violated  
11 by the Board because "[t]here is no evidence to support" its  
12 decision. (Pet. Attach. at 46.) Petitioner's claim fails.

13 Because California prisoners have a constitutionally  
14 protected liberty interest in release on parole, they cannot be  
15 denied a parole date without the procedural protections necessary  
16 to satisfy due process. McQuillion, 306 F.3d at 902. A parole  
17 board's decision must be supported by "some evidence" to satisfy  
18 the requirements of due process. Superintendent v. Hill, 472 U.S.  
19 445, 455 (1985); McQuillion, 306 F.3d at 904; Morales v.  
20 California Dep't of Corrections, 16 F.3d 1001, 1005 (9th Cir.  
21 1994), rev'd on other grounds, 514 U.S. 499 (1995). The evidence  
22 underlying the board's decision must have some indicia of  
23 reliability. McQuillion, 306 F.3d at 904; Jancsek v. Oregon Bd.  
24 of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). The factors used  
25 to determine reliability are whether the prisoner had an  
26 opportunity to appear before and present evidence to the Board,  
27 see Pedro v. Oregon Parole Bd., 825 F.2d 1396, 1399 (9th Cir.  
28 1987), whether the prisoner's allegations of a violation by the

1 Board are of a minor nature, see Morales v. California Dep't of  
2 Corrections, 16 F.3d 1001, 1005 (9th Cir. 2002), whether the  
3 allegations are supported in fact, id., whether the prisoner had  
4 any opportunity to participate in the proceedings, id., and,  
5 whether the prisoner took full advantage of this opportunity, id.

6 In denying Petitioner's request for parole, the Board cited  
7 as evidence the especially cruel nature of the commitment offense  
8 by stating that:

9 The offense was carried out . . . in an especially cruel  
10 manner. Multiple victims were attacked. One was injured  
11 in the 245 incident -- or two of them were injured in the  
12 245 incident, which is count two, and one was killed in  
13 separate incidents. . . . [T]he motive for the crime was  
14 unexplainable . . . in that this crime was unprovoked by  
15 the victim . . . . [T]he prisoner waited for the victim  
16 at his girlfriend's house and when the victim arrived and  
17 the girlfriend was getting into the car, the prisoner  
18 jumped into the car and as the victim was starting to  
19 drive off, grabbed the steering wheel . . . the victim  
20 got out of the car and ran with the prisoner pursuing  
21 him. The prisoner ultimately stabbed the victim in the  
22 chest killing him.

23 (Resp't Ex. C at 111.)

24 In addition to Petitioner's psychological assessments and  
25 disciplinary history, the Board also cited his escalating pattern  
26 of violence by explaining that he was out of control and assaulted  
27 two or three other parties three months prior to the commitment  
28 offense. (Id. at 112, 114-16.) Furthermore, the Board noted  
Petitioner's failure to complete any vocational programs, his need  
for more self-help or therapy programs, his need to remain  
disciplinary free, and his unstable social history. (Id. at 112,  
116-117.) Even though the Board recognized certain positive  
aspects of Petitioner's profile, including his "exceptional work  
reports" and his participation in three therapy programs, it did

1 not find that those positive aspects outweighed his unsuitability  
2 factors. (Id. at 113.) Finally, the Board cited the opposition  
3 of the Los Angeles County District Attorney. (Id. at 117.)

4 Petitioner argues that the Board's finding that the nature of  
5 his offense outweighed the positive aspects of his profile was not  
6 supported by the evidence. He also claims that the Board's  
7 decision to deny parole violated his due process rights because it  
8 did not act impartially and did not comply with California Penal  
9 Code § 3041(a), which states that the Board "shall normally set a  
10 parole release date. . . ." Cal. Penal Code § 3041(a). There is  
11 an exception to § 3041(a), which states:

12 the board, sitting en banc, shall set a release date  
13 unless it determines that the gravity of the current  
14 convicted offense . . . or past convicted offense or  
15 offenses, is such that consideration of the public safety  
requires a more lengthy period of incarceration . . . and  
that a parole date, therefore, cannot be fixed . . . .

16 Cal. Penal Code § 3041(b). However, Petitioner argues that the  
17 Board's overuse of this exception is evidence that the Board was  
18 not impartial and had a predisposition to deny his parole  
19 regardless of the circumstances.

20 In Biggs v. Terhune, the Ninth Circuit found that parole  
21 denial based solely on the gravity of the commitment offense can  
22 initially satisfy due process requirements, and that the "some  
23 evidence" standard could be satisfied by the Board's consideration  
24 of the gravity of the offense. 334 F.3d 910, 915-16 (9th Cir.  
25 2003). However, in dicta, the Biggs court held that courts may  
26 also consider the Board's decision-making process over time: "The  
27 Parole Board's decision is one of 'equity' and requires a careful  
28 balancing and assessment of the factors considered . . . . A

1 continued reliance in the future on an unchanging factor . . .  
2 runs contrary to the rehabilitative goals espoused by the prison  
3 system and could result in a due process violation." Id. at 916-  
4 17.

5       Petitioner has supplemented the record with additional  
6 evidence (docket nos. 41, 48), including prior denials by the  
7 Board in other inmates' parole suitability hearings, to show a  
8 pattern of conduct that suggests the Board has a predisposition to  
9 deny parole. It may be logical to deduce that the current parole  
10 denial rates evidence the Board's alleged predisposition to deny  
11 parole. However, Petitioner has not proven that this alleged  
12 predisposition played any role in the Board's decision in his  
13 case.

14       In Irons v. Carey, the petitioner was convicted of second  
15 degree murder and denied parole five times. 505 F.3d 846, 849-50  
16 (9th Cir. 2007). The trial court granted the petitioner's habeas  
17 petition, which challenged his parole denial after serving sixteen  
18 years of a seventeen-years-to-life sentence. Id. at 849.  
19 However, the Ninth Circuit reversed, finding that the denial of  
20 parole based on the egregiousness of the offense prior to the  
21 expiration of the petitioner's minimum sentence was not a  
22 violation of due process. Id. at 854. Similarly, Petitioner has  
23 only been denied parole three times and has not served his minimum  
24 sentence.

25       In a recent case, the Board granted the petitioner parole at  
26 his eleventh parole suitability hearing after he had served  
27 twenty-seven years of a fifteen-years-to-life sentence for second  
28 degree murder. See Hayward v. Marshall, 512 F.3d 536, 547 (9th

1 Cir. 2008). The Ninth Circuit found a due process violation  
2 because the governor reversed the Board's parole grant by relying  
3 on the gravity of the commitment offense, which is an "unchanging  
4 factor." Id. The Ninth Circuit also found that the governor's  
5 reversal was not supported by any evidence that the petitioner's  
6 release would threaten public safety. Id.

7 Here, the Board relied on more than Petitioner's commitment  
8 offense and criminal history when denying his parole. Although  
9 the "cruel and callous" nature of Petitioner's commitment offense  
10 and his criminal history weighed heavily in the Board's  
11 determination, his unstable social history, prison disciplinary  
12 history, and failure adequately to participate in vocational and  
13 self-help programs all counseled against parole. (Resp't Ex. C at  
14 111-18.) Finally, despite not having served his minimum sentence,  
15 Petitioner is challenging only his third parole hearing while the  
16 petitioner in Hayward was challenging his eleventh.

17 The Los Angeles County Superior Court concluded that the  
18 record contained "some evidence" to support the Board's finding  
19 that Petitioner is unsuitable for parole. (Resp't Ex. G at 3.)  
20 The California state courts' denial of Petitioner's claim was not  
21 contrary to, or an unreasonable application of, controlling  
22 federal law, nor based on an unreasonable determination of facts.  
23 See 28 U.S.C. § 2254(d). Accordingly, Petitioner is not entitled  
24 to relief, and his due process claim is DENIED.

25 The Ninth Circuit's evolving guidance in Biggs, Sass, Irons,  
26 and Hayward suggests that the Board may continue to evaluate  
27 static factors, including the nature of the commitment offense and  
28 pre-conviction criminality, in deciding whether to grant parole.

1 See Sass, 461 F.3d at 1129. The weight to be attributed to those  
2 immutable events, however, should decrease as a predictor of  
3 future dangerousness as the years pass and the prisoner  
4 demonstrates favorable behavior. See Biggs, 334 F.3d at 916-17;  
5 Irons, 505 F.3d at 851. Should Petitioner follow the Board's  
6 advice by attending self-help programming and maintaining a  
7 positive disciplinary record, continued parole denials based on  
8 Petitioner's commitment offense alone could eventually give rise  
9 to a due process violation. See Biggs, 334 F.3d at 916-17;  
10 Hayward, 512 F.3d at 547.

11 B. Sentencing Matrix

12 Petitioner claims a due process violation because he is  
13 overdue for release pursuant to the Board's sentencing matrix.  
14 (Pet. Attach. at 9, 11.) The base term for the first degree  
15 murder of a "friend" resulting from "severe trauma" is twenty-  
16 eight, twenty-nine and thirty years. Cal. Code Regs., tit. 15,  
17 § 2403(b)(C)(II). Relying on California Penal Code § 2931(a) and  
18 California Code of Regulations § 2403(b)(C)(II), Petitioner argues  
19 that, because he had served twenty-two years in prison when he  
20 filed the present petition and received seven years of post-  
21 conviction credit, he has met the maximum sentence proscribed by  
22 the sentencing matrix. (Pet. Attach. at 9, 11.)

23 California Penal Code § 2931(a) states, "In any felony in  
24 which a prisoner was sentenced . . . pursuant to Section  
25 1170 . . . the Department of Corrections shall have the authority  
26 to reduce the term prescribed . . . by one-third for good  
27 behavior . . . ." Cal. Penal Code § 2931(a). If § 2931(a) was  
28 applicable, the maximum sentence in the matrix, thirty years,



could be reduced by one-third or to twenty-nine years. Id.  
Therefore, Petitioner argues, based on his calculation, that he  
has served the maximum term proscribed by the sentencing matrix.  
(Pet. Attach. at 11.)

This argument fails. Petitioner is serving an indeterminate  
sentence under California Penal Code § 1168. When a prisoner is  
sentenced under § 1168, the parole board is empowered to determine  
if he is suitable for parole. Cal. Penal Code § 3040(b). If so,  
the board will set a release date, reducible by one-third with  
post-conviction credits, after consulting the matrix.<sup>4</sup> Cal. Code  
Regs. § 2411(a). However, the matrix need not be consulted if a  
board finds the prisoner to be unsuitable for parole. In re  
Dannenberg, 34 Cal. 4th 1061, 1071 (2005).

Here, the Board found Petitioner to be unsuitable for parole.  
Therefore, it was not required to consult the matrix or calculate  
good time credits. Petitioner's argument fails, and his due  
process claim relating to the Board's sentencing matrix is DENIED.

#### CONCLUSION

For the foregoing reasons, the petition for a writ of habeas  
corpus is DENIED. The Clerk of the Court shall enter judgment and  
close the file. Each party shall bear his own costs.

IT IS SO ORDERED.

Dated: 5/12/08



CLAUDIA WILKEN  
United States District Judge

<sup>4</sup> "The Board may grant . . . postconviction credit when the  
prisoner's performance, participation or behavior warrants such  
adjustment . . . of credit." Cal. Code Regs., tit. 15, § 2410(b).  
"[T]he panel shall consider . . . (1) Performance in Institutional  
Work . . . , (2) Participation in Self-Help and Rehabilitative  
Programs . . . , [and] (3) Behavior in the Institutional Setting."  
Id. at § 2410(c)(1)-(3).

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

LIEBB,

Case Number: CV04-04213 CW

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

BROWN et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 12, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Denise Alayne Yates  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004

Stephen Liebb C-60825  
San Quentin State Prison  
San Quentin, CA 94974

Dated: May 12, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk

United States District Court  
For the Northern District of California